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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., *Appellants,*

v.

DAVID H. KURTZMAN, ET AL., *Appellees.*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

PETITION OF APPELLEES FOR REHEARING AND SUPPLEMENTAL OPINION

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PETITION OF APPELLEES FOR REHEARING AND SUPPLEMENTAL OPINION

For Appellees to tell the Court that it committed fundamental error is done with painful reluctance. With most Courts, there is always a higher court to which an aggrieved party can go. However, from this Honorable Court, there is no further tribunal—legislative or judicial—which can redress the grievances which Appellees believe genuine. This Petition for Rehearing is submitted from a sincere and honest belief that the Court's decision in this case will result in a gross miscarriage of justice which can and should be avoided.

Pursuant to Rules 58 and 59 of this Court, Appellees herein petition this Honorable Court for Rehearing and for Supplemental Opinion in the matter of *Lemon, et al.* v. *Kurtzman, et al.*, No. 89, decided June 28, 1971. The grounds for this petition are summarized as follows:

I. The Opinion of the Court Must Be Clarified and Delimited Since the Court Erroneously Assumed Facts Not of Record in Adjudicating the Issue of Constitutionality.

II. The "Entanglement" Test, as Now Employed in *Lemon,* Is Contrary to This Court's Prior Rulings on the Establishment Clause and Lacks Rational Basis.

III. The "Entanglement" Concept, as Given by the Court in This Case, Is a Suppressant of Religious Liberty.

IV. The Court Should, by Supplemental Opinion, Remove the Suggested Disapproval of Free Political Expression by Religious Groups.

V. The Court's View of Establishment Is Founded in Part Upon a Misreading of History.

I. The Urgent Need for Clarification of the Decision.

Unlike the companion Rhode Island case (*DiCenso*), the *Lemon* case came to this Court before Answer and Trial, upon grant of a Motion to Dismiss Under Rule 12(b)(6). It thus presented the sole question of the sufficiency of the Complaint's allegations. In accepting those allegations "for the purposes of our review" (*Lemon* v. *Kurtzman,* Slip Op., 16) this Court must have deemed the review and allegations to be confined to the sufficiency of the Complaint, and not to make ultimate findings of operative facts and constitutionality.

Obviously the hypothetical admissions to test the sufficiency of a pleading as to seven named schools (this not being a class action—see pp. 5, 9, *infra*) could not support a final nullification of the challenged statute. Nevertheless, the opinion of this Court declared in unqualified language:

> "We hold both statutes are unconstitutional." (Slip Op., 2)
>
> ". . . for we conclude that the cumulative impact . . . arising under the statutes in each State involves excessive entanglement between government and religion." (Slip Op., 9)

The quoted language and other language of the combined *Lemon-DiCenso* opinions, equate the disposition of two critically different cases, one of which reviewed final disposition after trial below, and the other (*Lemon*) of which reviewed only the propriety of a pre-trial motion. This was sufficiently misleading, whatever the Court's intent in remanding *Lemon,* to convince not only the news organs and lawyers across the nation, but also the Reporter of Decisions of this Court, to conclude and report that the *Lemon* decision constituted a final nullification and termination of the Pennsylvania statute, with respect to all nonpublic schools and in all circumstances. See headnote, *Lemon* v. *Kurtzman* (Slip Op., II).

In effect, the Court's opinion can be read as a sweeping declaration of invalidity of the Act as applied to all the 1,181 contracting nonpublic schools, regardless of their actual character, control or purposes—this being based solely upon the characterization of Roman Catholic schools in Rhode Island which the Court articulated from the *DiCenso* record into its *Lemon* opinion.

If, as we believe, this Court did not intend to go beyond ruling on the sufficiency of the Complaint, the tremendous mischief that will ensue from the common misconception of the decision should be rectified by a Supplemental Opinion. In the interest of justice, and of fair notice to all interested citizens and officials across the land, and to avoid the inevitable dispute on remand, with attendant harm in delay, costs and premature statutory termination, this Court should clarify the scope of its decision at this time. If it does not, it will surely invite multiplicitous litigation and a second appeal to this Court for clarification, no matter whose interpretation might be accepted below on remand.

If this Court intended, as we do not believe, to strike down the statute as to all schools, (or even as to schools, such as Appellee Akiba Academy and non-denominational schools, which have no church relationships) without an opportunity to rebut and test the facts alleged in the Complaint, it will not only have denied Appellee Schools and other non-public schools of their right to a day in court, but will have also deprived all interested schools of a rational interpretation and application of this Court's constitutional standards; and as well of a considerate interpretation of the severability of the state statute. Such a broadside nullification would surely constitute an advisory, as well as premature and unfounded, adjudication. It is for this reason that the dissenting Judge below (Hastie, C. J.) concluded his constitutional discussion with a limited ruling on the motion:

> "As to Lemon's First Amendment claim, the motion to dismiss should be denied." (Appendix A-112).

In their brief to this Court, Appellee Schools took considerable pains to delineate the precise posture of this case (Brief of Appellee Schools, 16-20), in order to avoid any confusion between the procedural issue of the sufficiency of the Complaint with the substantive issue of the truth and pertinence of those allegations *qua* different schools, upon Answer and Trial. The perpetuation of such confusion by an overbroad appellate opinion is especially unjust in view of Appellants' abandonment of the class action, upon challenge by Rule 23(c) Motion (Appendix A-39-42, A-54). Prior to the ruling on the Motion to Dismiss, the Court below properly delimited the scope of the Complaint and its allegations, to apply only to the seven schools selected as defendants by the Appellants:

> "4. In the light of plaintiffs' Answer to Defendants' Motion under Rule 23(c), It Is Further Ordered (a) that the within action shall not be maintained as a class action; and (b) that the last sentence of paragraph 7 of the complaint and similar allegations of like nature contained in the complaint need not be answered by defendants." (Appendix A-54).

Indeed the lack of reference to this in the *Lemon* opinion, raises the question whether the Court overlooked this crucial delimitation of the allegations of the Complaint. Pursuant to the quoted Order, Appellees filed a Motion To Strike Representative Allegations of the Complaint (Appendix A-7, A-67-71) which was pending and not ruled upon when the Motion To Dismiss was granted.

On such a record, it seems clear that this Court could not have intended to elevate and treat the allegations

of the Complaint as adjudicated constitutional facts governing all statutory relationships of all non-public schools.

A. ONLY THE SUFFICIENCY OF ALLEGATIONS OF AN UNANSWERED COMPLAINT IS BEFORE THIS COURT.

As shown by the docket entries in the Appendix, the Appellee Schools filed several concurrent motions in order to obtain clear notice from plaintiffs which of the shotgun allegations of the Complaint were directed to the respective named defendant schools and which were directed to classes of schools not named as defendants. Only after Appellants elected not to accede to the Motion For A More Specific Statement, or to the Rule 23(c) Motion, and only after the Appellants (in our view inconsistently) demanded a three judge court, was the Complaint dismissed under Rule 12(b)(6). Thus the entire pleading context, as well as Appellees' specific selection of the Motion to Dismiss, indicates an intent to admit facts only for the purpose of testing the sufficiency of the Complaint. Were this not so, Appellee Schools would have filed Answers making admissions, and employed Motions for Summary Judgment. Indeed, the Appellee Schools believed (and still do) that many of the averments accepted as well-pleaded facts by this Court are bare legal conclusions. Since Appellees selected the proper form of Motion to limit the effect of their admissions under the Federal Rules of Civil Procedure (Wright & Miller, Federal Practice and Procedure §§ 1356 at 592; 1355 at 587 (1969)), the issue they raised, and their admissions, cannot be expanded on appeal to preclude their disputing the Complaint allegations on remand. Since these are the same allegations which underlie this Court's reasoning,

there can be no final adjudication of facial unconstitutionality at this stage.

1. *This Court does not render advisory opinions.* In the absence of properly adjudicated constitutional facts, a literal reading of the Opinion of the Court in *Lemon* would give it the character of an advisory opinion. On such a fundamental doctrine, this Court hardly requires any citation, but two recent admonitions by several Justices of this Court bear repeating here, for they are peculiarly pertinent to the complexity and importance of the issues in this case:

> "Constitutional adjudication is a responsibility we cannot shirk. But it is a grave and extraordinary process, one of last resort. And when it cannot legitimately be avoided, it is a function that must be performed with the utmost circumspection and precision, lest the Court's opinions emanate radiations which unintentionally, and spuriously indicate views on matters we have not fully considered." *Jenkins* v. *McKeithen,* 395 U.S. 411, 433 (1969) (Harlan, Stewart, White, JJ, dissenting).

> "This case is not simple for another and more immediate reason. We do not know the facts of the case. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts."

> * * *

> "The precipitous action of this Court aborting a trial not yet completed is not the kind of judicial conduct which ought to attend the disposition of a great issue."

> " 'Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feel-

ings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.' "

"With such respect as may be due to the contrary view, this, in my opinion, is not the way to try a law suit of this magnitude and asserted importance. It is not the way for federal courts to adjudicate, and to be required to adjudicate, issues that allegedly concern the Nation's vital welfare." *New York Times* v. *United States,* 39 U.S. Law Week 4897, 4890 (Burger, C.J., dissenting, June 30, 1971). See also Harlan, J., dissenting *id.* at 4891, 4892; Blackmun, J., dissenting, *id.* at 4894.

2. Upon reversal of the dismissal under Rule 12(b)(6) Appellees are, of right, entitled to file Answers and to proceed to trial upon relevant facts placed in dispute by their respective Answers. The procedural due process rights of the Appellees to deny the Complaint allegations by Answer, following a denial of Motion To Dismiss, are specifically preserved by Rule 12(a) of the Federal Rules of Civil Procedure which extends the time for filing Answer to ten days following final disposition of Motion to Dismiss. That this right is not lost by the effective denial of such a Motion on appeal is made clear by this Court's action in a recent case which, procedurally, presents a direct and governing parallel to the situation at bar. In *Jenkins* v. *McKeithen,* 395 U.S. 411 (1969), the plaintiffs, as here, sued in a federal district court seeking from a three judge court a Declaratory Judgment and Injunction on allegations that a Louisiana statute violated the Due Process Clause of the federal constitution. As here, the District Court dismissed the Complaint on Motion,

but the Supreme Court reversed the dismissal on the view that the Complaint was sufficient to state a cause of action. In doing so, however, the Court opinion took care to avoid going beyond the issue presented:

> "We also wish to emphasize that we do not hold that appellant is now entitled to declaratory or injunctive relief. We only hold that he has alleged a cause of action which may make such relief appropriate. It still remains for him to prove at trial that the Commission is designed to and does indeed act in the manner alleged in his complaint, and that its procedures fail to meet the requirements of due process." *Id.* at 431.

3. *There is no basis to treat the Motion to Dismiss as a Motion for Summary Judgment.* Federal Rule 56 which is designed to test the merits, (as against the formal sufficiency) of the Complaint, could not be, nor was it, invoked either below or on this appeal. The plaintiffs did not file any Motion under Rule 56, nor did they request any hearing, or attempt to present any evidence in support of such a motion. At no time was there any proposal, by any party or by the court below, that summary judgment proceedings be undertaken as the foundation for treating the Motion to Dismiss as a Motion for Summary Judgment.

4. *Appellants voluntarily abandoned their class action below and the Court below excluded the class action allegations from the case.* As delimited by the Order of the Court below, following abandonment by Appellants of their class action (see p. 5, *supra*) the Complaint allegations cannot now be deemed to apply to any but the seven named defendant schools; hence the action cannot pertain to the total operation of the statute which embraces all nonpublic schools, including

nondenominational and interdenominational schools. Even as to the defendant schools, the Complaint made no allegations concerning their classroom activity or management, other than the broadest conclusions regarding their dual purposes. The Appellee Schools filed a Motion For More Specific Statement which was not ruled upon, and they are surely entitled to pursue that Motion, as well as to dispute by their Answers the allegations which impute to them unconstitutional activities or relationships. There is, therefore, no foundation as to any nonpublic schools for a statutory nullification.

B. THERE IS NO BASIS FOR SUPPLYING DISPUTED CONSTITUTIONAL FACTS IN THE GUISE OF JUDICIAL NOTICE.

In *Board of Education* v. *Allen,* 392 U.S. 236 (1968) this Court properly refused to indulge in loose speculation concerning the stereotyped, often mythical, as well as outdated, characterizations of church-related schools. While there is no suggestion of formal judicial fact-finding in the opinion of this Court in *Lemon,* the broad opinion language might be taken by some as implying judicial notice of the very facts which Appellee Schools and other schools may well demand trial upon. This misconstruction should be avoided by clarifying Supplemental Opinion.

The proposed Rule 201 of the Proposed Federal Rules of Evidence (March, 1971) entitled "Judicial Notice of Adjudicative Facts" reflects the view that facts which are subject to reasonable dispute should not be judicially noticed, and further that:

> "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request

may be made after judicial notice has been taken." Proposed Federal Rule of Evidence 201(3)—Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

Needless to say, no party has had the opportunity to demand a hearing because no judicial notice has been undertaken. But if and when such judicial notice may be proposed to classify the operation of any nonpublic schools, including the Appellee Schools, the undersigned counsel propose to vigorously challenge the propriety of such, and to demand a hearing to produce proofs thereon. For the fact is that generalized impressions of church-school relations, even as held by otherwise learned men, can be grossly ill-founded in this period of rapid and radical changes within all church associations, and especially where they are based on pejorative 19th century caricatures.

The fact is that there are different kinds of Catholic schools, parochial and non-parochial, diocesan and non-diocesan. There are different kinds of Jewish schools, synagogue and non-synagogue. There are different kinds of Protestant schools, from the relatively unstructured Unitarian and Quaker to the fundamentalist Adventist and Calvinist. There are interdenominational schools that may be less church-related than even nondenominational nonpublic schools. Judicial noticing on such a varied mass by selected references either from bygone times or from unrepresentative examples would substitute gross guesswork for critical fact-finding.

Unlike much smaller states, Pennsylvania has a markedly varied pattern of nonpublic education. The variety arises not only between nondenominational and church-related schools, but also between different de-

nominations and within given denominations. The numerous Catholic schools are, contrary to popular myth, greatly diverse in their operations and church relationships. The private Catholic schools are differently related to church authority than are parish schools; and the administration of high schools is also distinct from the administration of parish schools. Finally the operation of any one of these categories of schools varies significantly from one diocese to another. These facts can be adduced at trial and properly placed before this Court. Unlike tiny Rhode Island, Pennsylvania contains eight independent dioceses of the Catholic Church. Thus it would be inherently unfair to place such schools under a blanket constitutional ban, without affording them the opportunity to demonstrate to a court that their relationships and operations in connection with the Pennsylvania statute do not involve the unconstitutional relationships described by this Court's decisions.

C. THE CHALLENGED STATUTE EXPRESSLY PROVIDES FOR SEVERABILITY TO PRESERVE ITS OPERATION, BOTH AS BETWEEN SCHOOLS HAVING DIFFERENT CONSTITUTIONAL STATUS AND STATUTORY FORMS OF AID HAVING DIFFERENT CONSTITUTIONAL IMPACT.

Independently of all the foregoing considerations, the express severance provision of the Pennsylvania statute and the distinctions drawn by this Court between different forms of aid suffice to make total nullification of that statute, at any stage of judicial proceedings, unnecessary and beyond the proper province of adjudication.

The Pennsylvania legislative will as to severability should be respected, and it is crystal clear:

> "Section 9. Severability.—If a part of this act is invalid, all valid parts that are severable from the

> invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect, in all valid applications that are severable from the invalid applications." (Appendix A-25).

Thus the legislature excluded the possibility of a numbers or percentage game, as Appellants would suggest, in terms of how many excluded schools or applications might or might not be sufficient to justify a total destruction of the statutory operation. Obviously the legislature has decided that question and determined that the statute should be severed and saved as to any school or any application that was constitutional. There is, therefore, no basis to conclude that the legislative purpose has failed. The statute should, therefore, stand as to all qualified schools and aid forms in accordance with the legislative will.

In its *Lemon* opinion, this Court properly refused to impute to the legislature a motive or design to help any particular kind or group of nonpublic schools. That ruling requires that the statutory beneficiaries and programs that are not under the ban of this Court's standards should not be deprived of the statutory operation.

Even in the absence of such a foursquare provision, there is nothing in the legislative educational aid tradition in Pennsylvania to justify an implication of nonseverability. If the Pennsylvania legislative enactments prove anything, it is that the legislature has aided nondenominational private schools at all levels, independently of church-related schools; and the Appellees stand ready to produce proofs to this effect, to negate the suggestion that the legislative intent was not to help as many schools as it constitutionally could.

Further, the statute is expressly made severable as to those forms of aid which, even under this Court's reasoning, would be constitutional as to all schools, namely books and instructional materials. Thus, as to any schools interdicted from receiving teacher salaries, but not books and materials, the statute, as to those schools, could be saved by the simple expedient of severing out the simple words "teacher salaries", without in the least upsetting the balance of the legislative scheme.

By carefully delimiting its opinion in *Lemon*, this Court would properly leave open the severance issues for further consideration. It provided the example for doing so by its severance action to preserve the statute in the *Tilton* case, and in other recent cases. See *e.g.*, *Connell* v. *Higgenbotham*, decided June 7, 1971, 39 U.S. Law Week, 4722.

1. The disparity of the nonpublic schools covered by the statute. As delineated at page 11, *supra*, the great variety of nonpublic schools embraced by the statute, but not embraced by the Complaint below or by the opinion of this Court, are entitled to protection from precipitate nullification of the statute in question. By legislative declaration the statute is intended to benefit those schools not falling under a specific constitutional ban. Their interests have not been placed before the Court, and Appellants elected to preclude their being brought before the Court in the Rule 23(c) proceedings below. It would be grossly unfair to them, as well as to Appellee Schools, to strike down a statute without affording them an opportunity to confront and contest parties who seek to destroy their interests in the challenged statute.

2. The statute provides distinct aid forms and programs, namely, teacher salary reimbursements, and re-

imbursements for books and instructional materials, as to which this Court indicated constitutional distinctions. Under this Court's opinions, different constitutional considerations enter into the validity of teachers' salaries *vis-à-vis* books and materials, thereby raising issues of severability as between these forms of aid. Those issues should receive further consideration, for it is clear that the channel or directness of aid is not *per se* controlling. In *DiCenso* the aid was indirect, but nullified. In *Tilton*, the aid was direct, yet upheld. While other considerations may bear on the validity of "non-ideological" forms of aid, they have not been fully explored. Hence the statute should not be totally terminated without a further consideration of those issues upon remand.

For all of the foregoing reasons, Appellee Schools submit that this case should be reconsidered upon rehearing, with a Stay of Mandate pending the issuance of a clarifying Supplemental Opinion. This matter is far too important to the quality and stability of education for millions of Pennsylvania's children to subject it to the almost certain and unnecessary risk of conflicting and improper interpretations of this Court's original opinion. This would be true even were the Court to adhere to its rationale and application of the "entanglement" thesis.

With all respect, however, Appellees suggest that the very difficulties outlined above are engendered by the thesis of "entanglement" as an independent constitutional standard. For the elevation of the undefined notion of "entanglement" into an independent constitutional standard, cut loose from the sound mooring of government neutrality to religion and from the objective test of secular purpose and primary effect, unduly

exalts but one of a complex of related policies underlying the Religion Clauses, policies which are necessarily in tension and which must be kept in balance if religious liberty for *all* citizens is to be accommodated and preserved in our pluralistic and pervasive welfare state.

II. THE "ENTANGLEMENT" TEST, AS NOW EMPLOYED IN LEMON, IS CONTRARY TO THIS COURT'S PRIOR RULINGS ON THE ESTABLISHMENT CLAUSE AND LACKS RATIONAL BASIS

A. THE "ENTANGLEMENT" TEST, AS APPLIED IN LEMON, IS CONTRARY TO PRIOR RULINGS.

The Court, in *McGowan, Schempp* and *Allen,* had provided a test which, for the decade preceding *Lemon,* the Court had considered as *the* test which it had evolved in order to determine whether a given piece of legislation would "withstand the strictures of the Establishment Clause". To this "purpose-effect" test it ascribed, in *Schempp,* a lineage going back to its decision in *Everson. School District of Abington Township.* v. *Schempp,* 374 U.S. 203, 222 (1961). This test, centering on the concept of "neutrality", received express affirmation in the *Walz* decision of 1970, 397 U.S. 664, 669 (1970). In *Walz,* it is true, the Court (clearly by way of dictum) spoke of "involvement" and "entanglement". Plainly it employed these highly descriptive nouns, not in order to fashion any *new* test of constitutionality, but to highlight important aspects of the "purpose-effect" test. The Court's whole discussion of "entanglements" in *Walz* centers upon whether these have a primary effect of advancing or inhibiting religion and upon nothing else. Indeed, the passages in *Walz* which deal with "entanglement" make no sense if one attempts to read them *apart from* consid-

eration of primary effect. For example, in *Walz*, the Court speaks of:

> —the fact that "[G]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit . . ." (*Id.* at 674). What sense did it make to point to such benefit if the benefit did not advance religion?
>
> —the fact that the "involvement . . . is a continuing one calling for official and continuing surveillance . . ." (*Id.* at 675). What sense did it make to point to such surveillance if the surveillance did not inhibit religion?
>
> —the fact that "[T]he hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches . . ." (*Id.* at 675). What sense did it make to speak of either if the effect was not that religion would thereby be inhibited or advanced?

Reason plainly dictates that "entanglement" cannot be employed as an *independent* standard of adjudication, divorced from the concepts of secular legislative purpose and primary effect of advancing or inhibiting religion. *Can it be seriously maintained that legislation which, having a secular legislative purpose, does not either advance religion or inhibit religion, can be called other than neutral in its effect?* In the common and sensible understanding of every man, that which does not help and does not hinder is neutral, and never until its decision in *Lemon* v. *Kurtzman* did the Court venture to say that legislation which is religiously *neutral* is at one and the same time offensive to the Constitution as an *establishment of religion.*

The "entanglement" teaching, in effect, creates a special exception to the neutrality test. This special exception is itself non-neutral.

B. THE "ENTANGLEMENT CONCEPT IGNORES EQUALLY IMPORTANT POLICIES THAT MUST BE RESPECTED TO PRESERVE GOVERNMENT NEUTRALITY TO RELIGION.

This Court has consistently recognized that religious liberty and its corollary, government neutrality to religion, are the paramount goals to be served by the Religion Clauses, whether read alone or in combination. By seizing exclusively upon "entanglement" in *Lemon*, this Court has deprived nonpublic school children and their parents of the protection of these goals, because it has ignored the crucial facts which justify government aid to nonpublic education.

It is *government* which, by intensively taxing the average citizen, at the federal, state and local levels, has caused the inability of citizens to pursue nonpublic education without some form of participation in government aid. It is *government,* not church groups, which has created the conditions which lead to the demand for distributive justice in educational aid. It is *government,* therefore, which is the cause of the very conditions which it seeks to redress by aid to nonpublic schools.

The practical, albeit the unintended, restrictions placed by government regulations upon the pursuit of religiously motivated conduct under state Sunday closing and unemployment compensation laws did not rise to the level of denial of free exercise since Sabbatarians could have complied with the government scheme at the cost of their own economic impoverishment. But this Court has never hinted that state government could not redress those government-created disadvantages by supplemental legislation designed to liberate the Sabbatarian from those cost burdens in the practice of their religion. So in *Lemon,* there is no *qualitative* differ-

ence in the degree of government neutrality and government accommodation by the state which seeks to aid education of persons in nonpublic schools who would otherwise be denied civic benefits as the price of their exercise of intellectual and religious freedom. In both cases there is no denial of religious practice but only an effective loss of government benefits. Thus the same *qualitative* test of neutrality through accommodation that is afforded to Sabbatarians should be applied to nonpublic school adherents.

It is of the essence that the same *qualitative* standard be applied to all religious groups. And the *quantitative* question of the permissible degree of accommodation must remain a factual issue to be determined upon trial. This issue cannot be fairly buried under a delusive *qualitative* legal standard of "entanglement".

C. "ENTANGLEMENT", AS EMPLOYED BY THE COURT, IS A STANDARDLESS STANDARD.

The consequences of the "entanglement" doctrine, as newly employed by the Court in *Lemon,* should now be weighed, because they are broader by far than the upsetting of Pennsylvania's narrow program of support for teaching children four secular subjects. One consequence is that the entirely sensible "purpose-effect" test becomes useless. It is obviously of no significance what the purpose of legislation is, or what its effect may be, if it can be said to involve something (namely, "entanglement") which is simply a *relationship* not necessarily having any identifiable purpose or effect at all.

At once appears a further consequence, and one that is ominous in terms not only of freedom of religion but broadly in terms of principles governing constitutional adjudication:

If "entanglement" is employed as an *independent* standard, rather than as a part of the purpose-effect test, then a "standard" is invoked which is not standard at all because (as will be seen *infra*) its application can only depend upon completely subjective factors. If such a standard is employed in this case, there is no reason why similar standardless standards cannot be employed in any other kind of constitutional adjudication. If such a standard is employed solely in cases involving state aid to education in parochial schools, that fact alone gives concern that it is not an arbitrary device seized upon *ad hoc* as a means of holding such aid void. The independent "entanglement" standard has indeed never until this case been employed by this Court as a *ratio decidendi*. Its inherently arbitrary character is seen very clearly in its employment herein:

1. *Application of the "entanglement" standard in the present state of the record is arbitrary.* There has been no trial in *Lemon*. Therefore the Court has had no record facts on which to go respecting the relationships which the Court calls "entanglement". With that state of the record, it is vain to speak, as does the Court, of a "cumulative impact of the entire relationship" which somehow causes "excessive entanglement between government and religion". Of what parts does this whole (of "cumulative impact") consist? The Court does not and cannot say, because there was not an iota of testimony before the Court as to *whether in fact* the so-called "surveillance" took place in the classrooms, *whether in fact* self policing and discipline were not observed by the teachers in keeping with the statute, *whether in fact* the auditing gave rise to any sort of state surveillance of class-

room instruction, *whether in fact* the Pennsylvania statute did not differ from the program upheld by the Court in *Tilton* solely by involving a *lesser* degree of "entanglement" between school and state than was present in the program upheld in the latter case.*

2. *Absent a factual record, the determination of "entanglement" is necessarily pure guesswork.* The Court stated:

> "The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance." (Slip op. 16).

The Court, however, does not provide even a single citation to history, or to any authority, to support this statement. The Brief for Appellee Schools set forth extensive documentation (pages 47-53 and Supplements B, C and D) to *demonstrate* that the experience in Pennsylvania is contrary to this hypothetical danger.

The Court, affording no basis for its conclusions respecting history, and ignoring the abundant available information based upon extensive past and present relationships between government and church-affiliated welfare bodies, then turns to what can, with due respect, only be termed *speculation* as to what

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* The contrast between the Court's views in *Lemon* and *Tilton* is striking. One could not imagine a more substantial "entanglement" than one in the concrete (literally) form of permanent accessions to the real estate of a church-related institution, under a government surveillance program which this Court, in *Tilton*, by its own hand, lengthens from a 20-year period to forever. By contrast, the Pennsylvania program consists of nothing but an *operating* program, *annually terminable*.

evils will flow from the Pennsylvania program. The Court is unwilling to raise this speculation to the status of actual prediction:

> "The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow." (Slip op. 17).

The Court further quotes its own dictum from *Walz*, that "a direct money subsidy would be a relationship pregnant with involvement" (*Id.* at 16). But just as not every pregnancy results in birth, so not every relationship results in pregnancy. To hint at a conclusion—totally unfounded in the record—and to use that hint as the basis for striking down a state's legislation is extraordinary and plainly calls for reconsideration.

More important, however, is the fact that these speculative dangers are in themselves irrelevant. Act 109 reimburses schools for part of the cost of (a) books and instructional materials (b) teacher salaries. Wherein does the supervision and control—related to books and instructional materials under Act 109—differ qualitatively from the supervision and control related to the same under the act upheld by this Court in *Allen*? (The program in *Allen* involved determinations of secularity by the State, the filling out of forms, and accounting. See Brief of Appellee Schools 51.) This critical question is neither raised nor answered by the Court and yet it goes directly to the heart of this case. Wherein, moreover, does the continuing supervision and control of the use of government-supplied materials seen in Act 109 differed qualitatively from that sanctioned by the Court in *Tilton*?

Wherein, indeed, does the character of the teacher who serves in a church-related school differ qualitatively from that of a teacher who serves in a public school? As we stated upon oral argument, there are people of intense religious and ideological commitment in the public schools, including, in Pennsylvania, ordained ministers and rabbis and teachers in Mennonite garb. Pennsylvania trusts these people to exercise self-surveillance with respect to the religious views to which they are committed.

3. *The "entanglement" standard as now employed in Lemon lacks rational basis.* The Court states:

> "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid which the State provides, and the resulting relationship between the government and the religious authority." (Slip op. 10).

It is elementary, that the *"character and purposes"* of an institution are distinct from whatever *relationship* that institution may have to any other entity. (Certainly the Court did not mean to imply that if it has a relationship, such relationship must result in any form of "excessive entanglement".) To this commonsensical proposition the Court writes in one exception: the church-related school. Such a school is defined by this Court to indicate that it presents an excessive degree of "entanglement"—on the benefit side, *i.e.,* for aid purposes but not on the burden side, *i.e.,* for costly compliance with governmental regulation of that school. This contradiction of "entanglement" in relation to aid but not in relation to governmentally enforced expenditures by the school,

illustrates the fallacy of treating the "entanglement" concept as a self-executing and rational legal standard. In the unique case of the church-related school, the Court presumes that the character and purposes of the institution somehow define the degree of relationship (*i.e.*, "excessive" or "non-excessive") which that institution will have with the state. That is to say, regardless of whether the factual record would disclose that the institution's relationship with the government neither advances nor inhibits religion and is in fact a benign, lightly regulated, trouble-free, socially beneficial relationship, the sole and mere fact that the institution has religious purposes and is under religious control may cause that relationship to amount to an excessive entanglement, *as a conclusion of law.*

What is more, just as this conclusion of law is not founded upon record fact, neither is it founded upon judicial notice. *It can therefore be said to be nothing more than this Court's personal and subjective judgment, not remotely related to any previously known principle of law.* This Court concludes that the fact that an institution is religious, inevitably and unexceptionably contributes to its having a relationship with the state which amounts to "excessive entanglement".

That the determination of "entanglement" depends more upon predilections and presumptions, rather than upon any rational measure, is further illustrated by the following questions:

How are courts, under the *Lemon* opinion, to classify church relationships arising out of placement of public wards at public expense in orphanages, homes for de-

linquents and protectories (all of which involve educational programs) which are run by churches?

How should courts treat government aid to hospitals, homes for the aged, and chaplaincies? Is the court to pick and choose which programs are constitutional by self-generated conclusions respecting "entanglement", without reference or deference to legislative judgments, and without opportunity by the state or by church institutions to make intelligible proofs at trial of non-excessive "entanglement" on behalf of the affected parties?

4. *The "entanglement" standard cannot be applied to religiously diverse institutions, without doing manifest injustice to some.* The Court's thesis is: that the character and purposes of the institutions benefited constitute a key factor in determining the existence of "excessive entanglement". The Appellee Schools, as noted herein, have widely differing characters and purposes. It would be preposterous on its face to assert (absent evidence) that Appellee Akiba Hebrew Academy has the same "character and purposes" as Appellee Germantown Lutheran Academy, or that the latter has the same "character and purposes" as Appellee St. Anthony's School. That being so, the Court's presumption that "excessive entanglement" is found in the case of all of these schools—and in the remaining 1,179 contracting schools in the Commonwealth—is without foundation.

III. THE "ENTANGLEMENT" CONCEPT, AS GIVEN BY THIS CASE, IS A SUPPRESSANT OF RELIGIOUS LIBERTY

While the "entanglement" concept, as employed by the Court in *Lemon*, is not capable of utilization as an independent standard for constitutional adjudication, it is clear that its employment directly entails vices long interdicted by this Court.

A. THE COURT'S FORMULATION OF THE "ENTANGLEMENT" RATIONALE, NAMELY HYPOTHETICAL FEAR OF "DANGER", IS DESTRUCTIVE OF THE LIBERTY OF THE TRUE STATUTORY BENEFICIARIES.

At no point did the Court's opinion in *Lemon* question the integrity of the legislative intent or in so many words attack the integrity of the schools and teachers receiving reimbursement for educating children in secular areas. The Court dwelled constantly, however, on the possibility of *"danger"* of unconstitutional actions or relationships. This process of reasoning is not only alien and contradictory to this Court's jurisprudence relating to First Amendment freedoms, but is utterly invidious in singling out for special adverse treatment nonpublic school student beneficiaries who might well claim a denial of the spirit of the due process and equal protection principles of the constitution.

1. *The "entanglement" approach presents all the vices of arbitrary and discriminatory government action which this Court has deplored for other branches of government.* As a matter of due process protection, the prospect of *"danger"* has never been accepted by this Court as a basis for governmental limitations of free expression whether by the press, by teachers or by publishers of obscene material, nor has the

"danger" club been employed to justify imposition of loyalty oaths or to deny exemptions to conscientious objectors. Nor has *"danger"* been sufficient to justify denial of equal protection in access to government jobs by suspected subversives or to legislated welfare payments by transient citizens and aliens. On the contrary, this Court has held unconstitutional any legislative action or disqualification grounded upon *"danger"* as being constitutionally repugnant whether cast in terms of vagueness or overbreadth.

2. *The vices of vagueness, overbreadth, and dragnet classifications are present.* The dragnet approach based upon *"danger"* should be no more imposed upon religious groups by this Court than by legislators and enforcement officers whose actions this Court has nullified. The hazards to liberty of "unfettered discretion" in making arbitrary and discriminatory judgments, not tied to rational standards and proofs should no more be countenanced (much less, imposed) by this Court to disqualify persons who adhere to nonpublic education either from religious motivation in the case of denominational schools, or from intellectual motivation in the case of all nonpublic, including nondenominational, schools. To do so would be to place the Religion Clauses in direct conflict with the equal protection principle—a conflict which is clearly untenable and contrary to the ideal of government neutrality. That the Religion Clauses embrace an equal protection principle was most recently noted by Mr. Justice Douglas, dissenting, in *Gillette* v. *United States,* 91 S. Ct. 828 (1971):

> " 'The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal jus-

tice under law.' Zorach v. Clauson, 343 U.S. 306, 320, 72 S. Ct. 679, 687, 96 L. Ed. 954 (dissenting). We said as much in our recent decision in Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228, where we struck down as unconstitutional a state law prohibiting the teaching of the doctrine of evolution in the public schools: . . ."

* * *

"'The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.' Id., 103-104, 89 S. Ct. at 270.

"While there is no Equal Protection Clause in the Fifth Amendment, our decisions are clear that invidious classifications violate due process . . .

* * *

"A classification of 'conscience' based on a 'religion' and a 'conscience' based on more generalized, philosophical grounds is equally invidious by reason of our First Amendment standards.

* * *

"'. . . freedom to differ is not limited to things that do not matter much. . . . The test of its substance is the right to differ as to things that touch the heart of the existing order.'"

3. *The Court sacrifices the substance of the Pennsylvania statute—aid to citizens—to the statute's form in channelling distribution through their service institutions.* That the *Lemon* opinion, in real life terms, chills freedom of intellectual and religious expression is undeniable; and that factor must be weighed against the posited danger of excessive entanglement. By disqualifying reimbursement for services rendered to and consumed by citizens to insure their quality education, in the name of institutional separation, this

Court denies those citizens the very *breathing room* for the exercise of their freedom through necessary associational activity. This is equally true of *Lemon* as of those cases wherein legislators attempted to abridge the associational activities pursued by teachers, Negroes, communists, and other distinct minorities. The many cases in which this Court has held such actions against the group activity to be unconstitutional abridgements of necessary associational activity, as bracketed to individual liberty, are legion and familiar to this Court.

In brief, the Appellees request this Court to uphold the spirit of the constitutional law, and not be guided by a vague notion of *"danger,"* since only the reality of a statutory benefit and the spirit of the law will give civic liberty the life and legitimacy it deserves.

IV. THE COURT, SHOULD, BY SUPPLEMENTAL OPINION, REMOVE THE SUGGESTED DISAPPROVAL OF FREE POLITICAL EXPRESSION BY RELIGIOUS GROUPS

For reasons given in the foregoing, it is abundantly clear that reargument of this case is called for, and a resultant Supplementary Opinion. But one other part of the *Lemon* opinion also warrants correction. That is Part IV, dealing with a "broader base of entanglement" found by the Court to be presented by "the divisive political potential of these state programs". This part of the opinion will logically be interpreted as a disapproval of political expression by supporters of parochial schools. Its implications go, however, far beyond that minority group in our society and extend to the religious and political liberties of all citizens. The Appellees plead that it be withdrawn by this Court and in this proceeding, since,

except for public opinion, this Court is the forum of last resort in the Nation, and what it has set forth in Part IV can have no other effect than to incite and encourage bigotry and religious conflict.

What the Court has suggested is that a statute aiding the education of children in parochial schools is void because it may occasion public disputes by persons who oppose such aid. The Court, in getting to this remarkable conclusion, which it has never applied in any other instance, singles out *religious* questions as questions about which there must be no public dispute. This it describes as a "broader base of entanglement". This addition to the definition of "entanglement" finally robs that term of its last vestige of neutrality and definiteness as a standard for constitutional adjudication. While earlier in the Court's opinion, "entanglement" seemed to be defined as a *relationship* between church-related institutions and state, and later appeared to mean a *resultant* of the religious nature of an institution and of a statute, here "entanglement" is used to describe the *exercise of the political rights* of speech, assemblage, petition and voting by a class of citizens and irrespective of the actual existence of any statute.

Under this view, in order to find out whether a statute violates the Establishment Clause, a court should apparently first make up its mind as to whether anybody will oppose the enactment or operation of the statute and, if it guesses that there will be opposition, then it must further guess how much. This is an open invitation to those who oppose, let us say, state purchase of useful secular educational services for parochial school children, to *make controversy,* indeed to make a *religious* issue of the matter, now realizing

that the more virulent is their campaign, the more fully is the "divisiveness and controversy" test met. Thus, the appearance of peaceableness in this test vanishes and its true face is seen, as a test which incites embroilment.

Under this test, considerations of *law* also vanish. The New York educational program for children, upheld by the Supreme Court, would likely have been terminated and its benefits to young citizens lost had the Court's test been applied. In New York, "controversy" arose as the result of the efforts of citizens to obtain this secular benefit for their children,* and a subjective judgment could have been rendered by the courts that the controversy was substantial. Thus, upon the basis of judges' guesswork that opponents of the program had in fact raised a violent enough hue and cry, the children in question would have been deprived of a substantial educational benefit to which, in *Allen,* this Court found they were constitutionally entitled. While the *Allen* test places religious majorities in states at no advantage, the Court's test places religious minorities everywhere at a *constitutional* disadvantage wherever their opponents decide to light the fires of conflict.

In our own time, a wide variety of federal and state programs conducted by many different religious denominations in the fields of health, welfare and education are, by the Court's new doctrine, inherently unconstitutional. But the reality is that these programs, however initially marked by controversy, were soon met with broad enthusiastic acceptance by the

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* See article, "Assembly Votes Textbook Loans", New York Times, May 12, 1965.

American people. Pennsylvania has afforded a particularly excellent example of this. Amazingly, admittedly without having any facts to go on, the Court says with respect to Pennsylvania:

> "Although *no facts have been developed* in this respect in the Pennsylvania case, it *appears* that such pressures for expanding aid have already required the state legislature to include a portion of the state revenues from cigarette taxes in the program." (Slip op. 19. Emphasis supplied).

The Court can and should have taken judicial notice of the fact that, after the Pennsylvania program had been in operation and its great merits seen by the public, a *consensus in favor of* the program, even greater than that which had caused its adoption, developed steadily, as the following tabulation of voting by the people's representatives illustrates:

	YEAS		NAYS	
	House	Senate	House	Senate
Act 109 (original Act) 6/11/68	107	30	74	17
Act 86 (Cigarette tax amendment) 3/25/70	114	36	76	8
Concurrence	150	—	57	—
Act 224 (Equalization amendment) 7/31/70	154	46	35	—
Concurrence	179	—	11	—

(Source: Legislative Journal, House and Senate, Commonwealth of Pennsylvania, 1968, 1970).

It is shocking that the Court would pejoratively describe the honest efforts of any group of citizens in the exercise of fundamental political rights of speech, petition and assembly as nothing more than "pressures" *and as though anything whatever in Amer-*

ican law, policy and tradition discountenances the efforts of any group to exercise manifest political rights.

It must now be asked whether the following instances of political activity "along religious lines" constitute "principal evils against which the First Amendment was intended to protect", or whether the sole admissible instance of such evils is the action of supporters of parochial schools aimed at getting programs of state aid for the benefit of American children attending such schools:

—Campaigns by religious groups for or against government spending for abortion and other forms of birth control.

—Campaigns by religious groups for or against Sunday Laws.

—Campaigns by religious groups with respect to Vietnam, Prohibition, welfare rights, gambling, capital punishment, racial discrimination, aid to Israel, relations with the Vatican, trade with South Africa, conscientious objection, obscenity, Bible-reading and prayer in public schools.

Do not all of the foregoing similarly present what the Court calls "religion intruding into the political arena"? Is there not, in each of these situations "the potential for political divisiveness related to religious belief and practice"? Where these are related to elections (as constantly they are) are not "candidates forced to declare and voters to choose"? Will not "many people confronted with issues of this kind . . . find their votes aligned with their faith"? Does not the "potential divisiveness" in these conflicts form as great (or as little) "threat to the normal political

process" as do the efforts of groups of Catholics and other Americans to seek public aid for secular objectives achieved in schools which state law decrees that children must attend if they do not attend public school?

The Constitution was not designed to create a secularist state. Americans have never agreed with the ideas of 19th century French laicism and the German *Kulturkampf,* that religion is a "private matter", and therefore a potential intruder in the public domain to be kept under strict confinement. The American tradition has always recognized that freedom of religious conscience is meaningless unless it includes freedom to express religious or, as in Pennsylvania, *secular,* ideas in public affairs. Professor Freund's highly secularist concept of the public role of religion, as adopted by the Supreme Court of the United States in *Lemon,* is one man's opinion which is clearly contrary to the constitutional traditions of religious pluralism in America. This singular concept is not entitled to elevation, by judicial fiat, to the level of constitutional law.

Under any such view, *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) should now be deemed overruled. There, in a Catholic neighborhood, a proselyting group singled out (to quote the Court in that case) "the Roman Catholic Church for strictures couched in terms which would naturally offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows." *Id.* at 309. The Court, upholding the political rights of the proselyting group, stated:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both

fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." (*Id.* at 310).

The abrasive conduct of the religious zealots, protected by this Court in *Cantwell,* bears no resemblance to the *peaceable and secular* campaign waged in Pennsylvania (in the form of letter writing, orderly appearances at public hearings, the engaging in civil debate, and contacting of legislators) by the supporters of Act 109. Indeed it was not the *supporters* of the Act who deemed it a "religious issue"; they campaigned for the Act precisely on the terms by which this Court describes its purposes:

"... the [Pennsylvania and Rhode Island] statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws." (Slip op. 8).

The Court, in its opinion, says:

"To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to *permit* questions of the Religion Clauses to assume such

> importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems which confront every level of government." (*Ibid.* Emphasis supplied).

We know of no prior opinion in the history of the Supreme Court in which the Court has presumed to state that some issues should be kept out of the forum of public discussion, that the earnest (or foolish) pleas of any group of citizens in the legislatures should not be permitted to "assume importance". Never before has this Court presumed to prescribe for the American people what issues the people are to deem of "importance" and what issues will "tend to confuse and obscure other issues of great urgency." Never before has this Court ventured to proscribe any issue as beyond the constitutional pale of public discussion. The resultant inconsistency between the free speech rights of supporters of public aid to children in parochial schools and the free speech rights of purveyors of pornography is jarring, to say the least.

V. THE COURT'S VIEW OF ESTABLISHMENT IS FOUNDED IN PART UPON A MISREADING OF HISTORY

At numerous points in its opinion, the Court makes mention of history in order to substantiate its views. The Court states:

> "We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches." (Slip op. 19).

The fact is to the contrary. State aid to church-related educational institutions was common until the third quarter of the nineteenth century at the ele-

mentary and secondary level and has persisted at the college level down to the present. See, generally, Gabel, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS (1937). The Pennsylvania Laws of April 12, 1838, contained an express provision permitting the use of public funds for the support of schools "under the care and direction of a religious society." LAWS OF PENNSYLVANIA 1700-1849 (Dunlop), 849. The date of 1838 is significant, since by that year the tide of the Catholic immigration from Europe had not yet been felt in Pennsylvania, and the Commonwealth at that time had a very small Catholic population.

Mr. Justice Brennan's concurring opinion in *Lemon* devotes several pages to history, pointing to the "bitter controversy" which arose in New York over the question of aid to sectarian schools in 1842. The opinion then notes that *"between 1840 and 1875,* 19 states added provisions to their constitutions prohibiting the use of public school funds to aid sectarian schools" and that thereafter 16 more states also did. (Slip op. 5-9. Emphasis supplied). Again, the dates are significant, because it was precisely in the period roughly delimited by the years 1840 and 1875 that a *new* concept of church-state relations was forcefully engrafted by the dominant majority upon American public policy. That concept was as unknown to the Founding Fathers as were the conditions of a modern industrial America in which one-seventh of the school population attends parochial schools. That concept centered on *education*—the so-called "school question"—and history points, with unmistakable thrust, at the origins of the "no aid to sectarian schools" concept. While the true intentions of the framers, in writing the

Religion Clauses of the First Amendment, are indeed far from fully revealed by history,* the intentions of those who, by the state constitutional *amendments* originating at mid-nineteenth century sought to impose a new view of disestablishment, are crystal clear. A brief sketch of historical developments in Massachusetts, where the "no aid to sectarian schools" movement was born, and in New York, where the movement achieved its most substantial success in 1894, shows that the "bitter controversies" had their origin, not in the "aggressions of the sectaries" who (according to the current fiction) stirred up "divisiveness" and "controversy" by their "designs on the public treasury", but in a pervasive bigotry which willed the suppression of sincere claims of parental freedom and religious liberty. The attention of the Court is respectfully called to Supplement A hereto which sets forth a chapter of American history profoundly relevant to the issues at bar. The vital interests of millions of American parents, of the financially plagued Commonwealth, of the cities of Philadelphia, Pittsburgh, Scranton and Erie, and the stake which all have in federalism, education, freedom of the mind and religious liberty are too great to allow them to be struck down upon constitutional theories derived from a misreading of history.

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* The simplicist view of the meaning of the Establishment Clause publicized by contemporary opponents of aid to church-related education has been widely rejected or held up to question. See Kauper, Religion and the Constitution (1964); Howe, The Garden and the Wilderness (1965); Katz, Religion and American Constitutions (1964).

CONCLUSION

It Is Respectfully Submitted That This Court Should Accord Appellees a Rehearing and Issue a Supplemental Opinion Herein.

Respectfully submitted,

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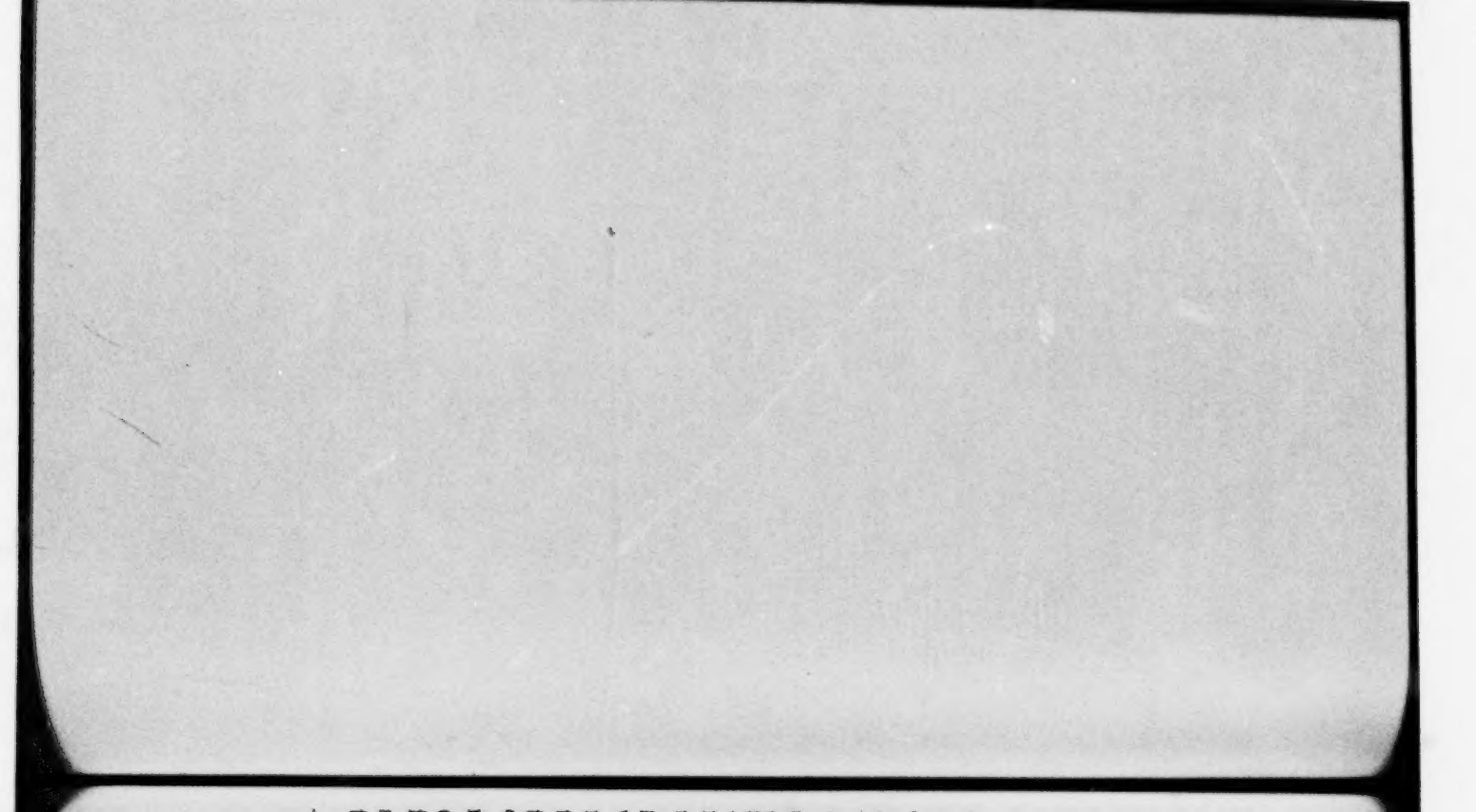
CERTIFICATE OF COUNSEL

As counsel for the Petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

/s/ J. SHANE CREAMER
/s/ WILLIAM B. BALL
Counsel for Petitioners

Dated: July 21, 1971



SUPPLEMENT A

MASSACHUSETTS:

Background of the Anti-Aid Amendment.

The Period of Establishment (1620-1833).

Education in Massachusetts, far from having come about as a secular development, nurtured by church-state separation, was born in the opposite principle of a hard-and-fast church-state union.[1] While civil control of most education in Massachusetts eventually supplanted church control, this education has been, for most of its 350 years, impressed, through state action, with marked religious—and sectarian—characteristics. During almost two centuries preceding the federal and Massachusetts constitutions, all Massachusetts education was intensively permeated with religion. The schools, in which this Bible-centered education was rendered, were at once "town" and Congregational Church schools. Due to the church-state union whereby the civil authority was obligated to promote religion,[2] and to the Calvinist concept of the ends of education, the conclusion must be regarded as correct that while the schools were, in a narrow sense, civil schools, they "remained virtually Congregational parochial schools for many years."[3] Correspondingly, general religious freedom in Massachusetts was unknown. "The absence of freedom of thought, especially on religious subjects, in seventeenth-century Massachusetts is so familiar a fact that a mere reminder should suffice."[4]

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[1] I Stokes, Church and State in the United States, 156 (1950).

[2] Smith, Religious Education in Massachusetts, 10 (1926).

[3] Gabel, Public Funds for Church and Private Schools, 51 (1937).

[4] Levy, Legacy of Suppression, 30 (1960).

In contrast to religious liberty granted them in some of the other colonies, the Charter of Massachusetts Bay, October 7, 1691, while purporting to grant religious liberty to all, expressly excepted Roman Catholics.[5] In 1780 Massachusetts, now a state of the new nation, wrote its first constitution. The Declaration of Rights thereof contained several provisions here significant: Article II enjoined upon all the worship of God. (This provision is still a part of the constitution.) Article III provided express power to the legislature to exact public support of education in the established Protestant religion.[6] This provision is a striking reaffirmation of the union of church and state in Massachusetts, to remain as the fundamental law of the Commonwealth until almost half a century after the national ratification of the Bill of Rights (including the Establishment Clause of the First Amendment). To become modified in 1833, Article III set up in legal contradistinction Protestants and all other persons (of whom there would soon be many in Massachusetts) and awarded to the former a legally enforceable tax-supported dominance in education.

The Period of Protestant Hegemony (1833-1963).

Two main features characterized this period: the coming of the Catholic presence in the Massachusetts community and the effort to maintain Protestant predominance in education in Massachusetts—the latter becoming especially vigorous in response to the former. Both developments have combined to determine in large part the present con-

[5] "... We do by these presents for us, our heirs and successors, grant, establish and ordain that for ever hereafter there shall be a liberty of conscience allowed in the worship of God to all Christians (except Papists) inhabiting or which shall inhabit or be resident within our said Province or Territory ..." Thorpe, Federal and State Constitutions, 3.

[6] Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay, 223, 224 (1832).

stitutional law relating to church-related education in the Commonwealth.

In 1789 the General Court had adopted a statute enjoining upon school instructors the duty of carrying into practice the principles stated in Article I of the 1780 constitution.[7] There has been much discussion as to why the heavily religious content of common schooling in Massachusetts gave way in considerable part to secular content between the period from the late 1820's to the end of the 1830's.[8] One of the reasons was undoubtedly the effect of the act of 1827 which provided, in part, that school committees might not direct school books to be purchased or used "which are calculated to favor any particular religious sect or tenet."[9] This was an outcropping of a sentiment for disestablishment which resulted in the deposing of Congregationalism as the State Church by constitutional amendment in 1833. But it was neither intended as a secularizing of the schools, nor as an opening to a general religious freedom.

As to secularization, it is clear from abundant testimony —soon to be eloquently reinforced by Horace Mann—that no such thing was intended. The view, instead, had come about, that a distinction could be made between "sectarian" doctrine, on the one hand, and general religious (including moral) instruction, on the other.[10] As to a general religious freedom, there was, at least in 1827, scarcely reason to believe that any religious bodies other than Protestant would be a significant factor in Massachusetts.

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[7] Laws of Massachusetts, 1788-1789, Acts 1789, c. 19, 417.

[8] See generally, Dunn, What Happened to Religious Education? 96-188 (1958); Cubberly, Public Education in the United States, 120-162 (1947).

[9] Laws of Massachusetts, X, c. CXLIII, 562-563.

[10] See the account of Mann's views in II Stokes, Church and State in the United States, 54 (1950).

Here was a society in which almost all were Protestant, whose traditions were nothing but Protestant, and in which Protestant Christianity (without, now, its points of internal dogmatic difference) would predictably be taught for all the future in the schools. The rise of a Roman Catholic population in Massachusetts was soon seen as a direct challenge to what had been, until that rise, a universal Protestantism in that state.

The saturating anti-Catholic education given the Massachusetts populace for two centuries, in the school house, from the pulpit and in popular custom laid the great base of prejudice in the state from which all manner of hostile activity would inevitably arise, once the leaders and followers of the Roman Catholic Church actually entered Massachusetts' boundaries. A leading present-day Protestant scholar, Ray Allen Bililngton, describes this atmosphere:

> "An effective lecture series was founded at Harvard in 1750 by Paul Dudley 'for the detecting and convicting and exposing of the idolatry of the Romish church: their tyranny, usurpations, damnable heresies, fatal errors, abominable superstitions, and other crying wickedness in her high places.' These widely publicized speeches attracted much attention and were normally circulated in pamphlet form. Antipapal feeling was attested even in the everyday life of the colonies: one New England constable refused to publish a king's letter when he suspected that it tolerated Romanism and when singing was first permitted in a Connecticut service a deacon rushed from the church shouting 'Popery! Popery!' Even a game called 'Break the Pope's Neck' was a popular diversion around the New England firesides. School books such as the *New England Primer* were normally anti-Catholic in sentiment and were illustrated with grotesque pictures of the Pope, while by 1774 *A Master Key to Popery* and similar propaganda works were

being advertised in America." Billington, The Protestant Crusade: A Study of the Origins of American Nativism, 16 (Quadrangle Books Ed., 1954).

If that body had been detested in its absence,[11] its physical presence triggered hatred unbounded.

There had been no Catholic church in Massachusetts until 1778.[12] In 1774 Massachusetts, commonly with the other colonies, had experienced a wave of anti-Catholic hostility with the passing of the Quebec Act by which Catholics in Quebec had been given the right to "have, hold, and enjoy the free exercise of the religion of the Church of Rome." Among the fears expressed was that of "their [Quebec's] members daily swelling with Catholic emigrants from Europe."[13] It was in the 1820's that Catholic emigrees became a notable factor in Massachusetts. Perhaps a natural distrust of foreigners, plus the serious increase in the population of the almshouses occasioned by these immigrants (mostly Catholic) made dry tinder for the fires of religious prejudice soon to reach consuming proportions in the No-Popery campaign which now appeared in the state and much of the rest of the East.

Just as Massachusetts' two centuries of anti-Catholic mind-set are essential to understanding of the "establishment" provisions of the Constitution of 1780 and of the No-Popery campaign which took hold in that state in the 1820's, so the latter becomes essential to an understanding of the ascendancy of the Know Nothing Party in the 1950's in Massachusetts, the peak of whose power was achieved precisely at the time the Constitutional Convention of 1853 was sitting. That convention wrote into the state constitution the first "anti-aid" amendment, Article

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[11] Billington, *ibid.*

[12] I Stokes, Church and State in the United States, 419 (1950).

[13] Stokes, *op. cit., supra,* at 786.

XVIII, whereby, a mere twenty years since the Massachusetts Constitution had mandated public support of Protestant education, it now barred public support of any sectarian education. So much has the thinking of the 1853 Convention dominated subsequent sentiment in Massachusetts, that space is given here to chief points made in the debates.

Debate on the amendment began on July 29, 1853, Mr. Parker, of Cambridge, laying the foundation for its defense by stating:

> "Sir, this resolution has nothing sectarian in its character. It proposes simply to retain and secure your common schools in the condition in which they are at the present time, beyond all peradventure, come from what quarter an attempt for change may come—and I care not from what quarter it comes . . ."[14]

Mr. Keyes, of Abington, commented as follows, upon the thrust of the amendment:

> "Every-body knows this resolution appears to be aimed at one class of our citizens, one denomination of religion. Nobody has intimated any apprehension that money would be used for the benefit of Protestant sectarianism. I have never heard that question raised in the State; but the question has been raised in the State, and discussed, in relation to the support of Catholic schools; and I am not willing, as one of the friends of the Constitution, that it should be embarrassed by any such provision. It is too important a question to be passed over in this manner; without any reasons given for and against it; and impatient as we all are to finish our labors here, I hope the Convention will look seriously at this matter before they assent to its being made a part of the organic law."[15]

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[14] III Debates in the Massachusetts Convention, 614 (1853).

[15] *Id.* at 615.

Mr. Wood, of Fitchburg, saw the public schools as sectarian-Protestant, and urged that Catholic schools should be as entitled to aid as such public schools:

"Many of the intelligent Irish do not and will not send their children to our schools. I had a conversation with one of these, a man who desires the advancement of learning as much as I or any man in the State. I asked him why he would not send to our schools. His answer was: 'I will not send my children to a sectarian school.' 'A sectarian school?' said I. 'Heavens! I did not know that our schools were sectarian.' 'Well,' said he, 'that is just the way with you here in America, and with religionists all over the world. Our sect is no sect; every-body else is sectarian. Now,' said he 'what constitutes a sectarian school? It is where you will have all the Protestant forms of worship introduced. You will insist on having prayers according to the Protestant forms. You introduce your Protestant Bibles and other Protestant books, and you will have none other. Now, I put it to you, would you be willing to send your children to be instructed by Roman Catholic priests; to be compelled to read their Bible, and have comments upon it?' I said 'No.' 'Very well, then, you ought not to expect us to do it.' Now, I put it to this Convention, how it is possible to raise any money by taxes to be expended for common schools, if it cannot be expended for either Protestant or Roman Catholic schools?

"Now, let me say another thing. It is all important that our Irish children should be educated. It is as important to us as it is to the Irish themselves. We do not want them to grow up amongst us, ignorant and vicious, first to rob our hen-roosts, and afterwards to commit more serious offences. It is all important that they should be educated. If we cannot educate

> them in such schools as we have, let us give them such schools as they can accept." [16]

He regarded the proposal as a "law against a sect." [17]

Wood was answered by Mr. Lothrop, of Boston, who insisted that "the establishment of common schools, in which the great mass of the children of the community, of all religious denominations, are educated together, is the only way in which we can prevent and keep down sectarianism." [18] Thus was the dual concept of the melting pot and the nonsectarianism of sectarian-Protestant education advanced in the debates.

Much to the fore, in the minds of the anti-aid advocates, was the desirability of heading off, by timely action, the threat which they felt the growth of the Catholic numbers posed, although the historical record is bare of evidence of any troubles being encountered by the public schools of Massachusetts due to Catholics or, indeed, of any "drives" by Catholics for support of Catholic schools. Mr. Chapin, of Webster, a supporter of the anti-aid amendment, admitted as much when he warned that

> ". . . efforts have been made in other parts of the Union. New York and other States have been affected with excitement on the subject. And I think it would be well to consider whether, in this State, we are not approaching the same condition, and whether it is not our best policy, to guard against it in time." [19]

Mr. Butler renewed the opposition, declaring the amendment "the most sectarian resolution that can be brought

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[16] *Id.* at 616.

[17] *Id.* at 617.

[18] *Ibid.*

[19] *Id.* at 619.

before a deliberative assembly."[20] He predicted that it would result in serious trouble for the future, bring a "controversy into the politics of this State." "We teach Protestantism," he said, ". . . But is that any reason why we should force it upon our neighbors?"[21]

Mr. Ball, of Upton, replied, with the plea: "Open your doors wide to all, and banish sectarianism from your schools, and Catholics will become Protestants through the influence of these schools."[22]

The vote taken on the motion to reconsider the amendment failed, 183 noes to 87 ayes.[23]

The careful documentation by Professor Billington of organized anti-Catholic bigotry in Massachusetts from 1800 to 1860 amply reveals the extreme virulence of that campaign and its extraordinary success in the Commonwealth.[24] The burning of the Ursuline convent at Charlestown, in 1834, was but the first in a series of acts of lawlessness to be perpetrated against Massachusetts Catholics prior to the Civil War. Describing the high tide of Know-Nothingism, Billington states that as a result of the fall elections of 1854: "Massachusetts was the scene of the party's greatest victories; there the governor and all state officers were Know-Nothings, the state Senate was made up entirely of representatives of that party, and the state House of Representatives was composed of one Whig, one Free Soiler and 376 Know-Nothings."[25]

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[20] *Id.* at 620.

[21] *Id.* at 621.

[22] *Id.* at 622.

[23] *Id.* at 626. And see discussion of the school fund II Debates in the Massachusetts Convention, 569-577 (1853).

[24] Billington, The Protestant Crusade (1938).

[25] Billington, *op. cit., supra,* 388.

From the 1830's on, through the nineteenth century and well into the twentieth, there were many incidents of protests by Catholics over Protestant practices in public schools in which Catholic children were enrolled. These protests were uniformly turned back, sometimes upon the assumption that these were not "sectarian" practices, sometimes on the view that no evil resulted from a Catholic child's having to receive Protestant-oriented instruction, and sometimes upon both bases.[26] As Catholic population in the state grew, and, with this, the multiplication of Catholic schools,[27] pressures against public aid for these schools mounted.

While there exist statements that the object of Article XVIII was simply to preserve the common school system, by the turn of the century there was no doubt that the anti-aid principle had as its main focus the Catholic schools. Thus the question came again to be excited, with expressions of anxiety that Article XVIII was not a sufficient safeguard against the (always prospective) depredations of the Catholic populace upon the public treasury. An anti-aid measure, broader than Article XVIII, had been before the Massachusetts legislature for fourteen of the sixteen years between 1900 and 1916. It was agitated continually and intensively during that period as a "Roman Catholic" question. It was the chief spur to the calling of the Constitutional Convention of 1917.

Respecting that convention, one commentator has stated:

> "Through the official record cannot show the truth, yet the real cause of the collision over the anti-aid

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[26] Most instructive, in terms of presenting the prevailing attitude, is *Commonwealth* v. *Cooke,* 7 Am. L. Rep. 417 (1859).

[27] Gabel states that in 1886, the growth of private schools surpassed that of public schools in Massachusetts. He infers that this was due to the increase in Catholic schools. Gabel, Public Funds for Church and Private Schools.

amendment was the antagonism of Catholic and Protestant. Years of struggle had occurred over legislative aid to Carney Hospital. Many Protestants feared, with the growing strength of the Catholics, that the latter would become a majority in political power and then would come appropriations of public money to parochial schools. This anti-aid amendment came at this juncture. It had some Catholic support in the convention." [28]

The first large scale debate at the Convention concerned the broadening of the anti-aid provision. Edwin U. Curtis, of Boston, offered the so-called Curtis-Lomasney Amendment, as a 46th Amendment to supplant Article XVIII. He stated that, had the framers of the latter known how much money would be spent on private institutions following 1853, they would have assured that no sectarian institution in the state would have been eligible for aid.[29]

Bishop Frederick L. Anderson, of the Newton Theological School, informed the Convention that 100,000 members of various "patriotic orders" supported the amendment. These orders, and, in chief, a group known as clerically oriented "Minute Men" constituted the shock troops whose aim was to storm public opinion in favor of the proposal:

"The agitation in favor of the anti-sectarian amendment has been carried on for several years by an or-

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[28] Bridgman, the Massachusetts Constitutional Convention of 1917, iv (1923).

[29] I Debates of the Constitutional Convention 1917-1919, 67-68. Of the nearly seven million dollars paid by the Commonwealth to educational and charitable institutions from 1860 to 1899, Catholic charitable enterprises were reported to have received $49,000 and Catholic educational facilities nothing. *Id.* at 176. See also II Bulletins of the Constitutional Convention 1917-1919, 60-79. After 1899 even the charitable institutions received nothing. It was stated that during the past half century the educational institutions receiving state aid included institutions engaged in the training of sectarian ministers.

> ganization known as the 'Minute Men,' counting in its membership some of the most distinguished clergymen of the state. Professor F. L. Anderson of Newton ... was nominated and elected a delegate at large on this issue, directly and avowedly." [30]

As the Minute Men pressed for passage, Protestant clergymen urged the same from the pulpit.[31] Shortly, the effort to push through the amendment was the subject of an intense and bitter religious controversy. John W. Cummings, opposing the measure, declared that the parochial schools had not asked the government for any money whatsoever and he blamed the "patriotic orders" such as the "Minute men" and the "Guardians of Liberty" [32] for the excitement over the issue.[33] He warned that the issue would result only in greater division and hatred in the future. Roland Sawyer, another delegate, stated that he believed that the election of the state's first Catholic governor, in 1913, had frightened many people into believing that a Catholic conspiracy existed. He compared the pro-amendment movement to the operations of the Know-Nothing Party in 1853.[34] William Cardinal O'Connell, Roman Catholic Archbishop of Boston, called the amendment an "insult to Catholics" [35] and urged its defeat.[36] On Election Day, the

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[30] Loring, A Short Account of the Massachusetts Constitutional Convention 1917-1919, VI The New England Quarterly, 15.

[31] *Id.* at 35. See also the Boston Globe, for October 29, 1917, p. 1, cols. 5-6.

[32] See Hennessy, Four Decades of Massachusetts Politics, 1890-1935, 210.

[33] Debates, *supra*, at 77.

[34] *Id.* at 183-184.

[35] Boston Globe, October 29, 1917, p. 1, col. 3.

[36] Boston Globe, November 5, 1917, p. 1, cols. 1-2.

Massachusetts Council of Churches urged approval.[37] The amendment was adopted that day by a vote of 206,329 in favor and 130,357 opposed.

NEW YORK:

BACKGROUND OF THE BLAINE AMENDMENT

The New York Constitutional Convention of 1894 cannot be understood except in the context of the history which preceded it. A highly visible issue in the convention was the question of imposing the constitutional prohibition which became the Blaine Amendment. While this was officially spoken of as the question of "aid to sectarian schools," it was popularly discussed and considered to be "the Catholic question."

The subject of the Church of Rome and Roman Catholics had been a deeply rooted, traditional preoccupation of a large majority of Americans in the colonies and in the nineteenth century republic. It had two foci: the fear of "Popery" and (especially after 1820) the fear of the immigrant. As Canon Stokes has stated, speaking of the anti-Catholic "Nativist" movement which thereafter swept the East Coast: "* * * it was the Roman Catholic 'foreigner' as the supposed emissary of the Pope that chiefly aroused the rabble."[38] The Know-Nothing Party, at mid-century, spearheaded this sentiment with immense political success. This party had its origin in New York City. Its Almanac stated its purpose:

> "Anti-Romanism, Anti-Bedinism, Anti-Pope's Toeism, Anti-Nuneryism, Anti-Winking Virginism, Anti-Jesuitism, and Anti-the-Whole-Sacredotol-Hierarchism with all its humbugging mummeries. Know-Nothingism is for light, liberty, education, absolute freedom

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[37] Boston Globe, November 6, 1917, p. 2.

[38] A. Stokes, I Church and State in the United States, 83 (1950).

of conscience, with a strong devotion to one's native soil."[39]

The success of this movement in New York, and its unremitting propaganda efforts up to the opening of the Civil War, laid a foundation in inherited family attitudes and popular consciousness which was to have marked effect in the postbellum decades.[40] While an important irritant, prior to the Civil War, in which the anti-Catholic and anti-immigrant sentiments had been intermixed was the burden upon public charities which the newly arrived, often indigent, aliens produced, an equally potent irritant, following the Civil War, was the education question.

The New York tradition in education had been, from the Dutch colonization forward, a religious tradition. When the common schools emerged in the mid-nineteenth century they were "as devoted to religious as to secular instruction."[41] The religious instruction was Protestant

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[39] Clinchy, Everett, R., All in the Name of God, 69, 70, as quoted in Stokes, *supra*, 838.

[40] These attitudes are described by Ray Allen Billington:

"All types of reading matter were utilized by those who employed the printed word to shower calumny on Catholicism. Children whose primary instruction was from one of the primers in common use were accustomed to crude engravings of Protestant martyrs and to sentiments placing Popery in alignment with heathenism and infidelity. Infant minds were shaped to believe that 'to be a Catholic, was to be a false, cruel and bloody wretch,' and that Popery included everything that was vicious and vile. The school training was often supplemented by parental instruction, for the women of America embraced the No-Popery cause with more enthusiasm than the men. Sincerely believing that their prejudice should be shared by their offspring, they instilled into their children an enduring hatred of Catholicism." R. A. Billington, the Protestant Crusade, 347 (Quadrangle Books ed., 1964).

[41] J. Pratt, Religion, Politics, and Diversity, 164 (1967).

—eventually a "nondenominational" Protestantism being the basis of the religious and moral training.

As early as 1840, Catholic citizens, unable in conscience to accept this kind of education for their children, increased their efforts to found their own schools and to obtain public aid for them. These efforts—augmented following the Civil War—met with stout resistance from the dominant Protestant majority and were repulsed, except for a few short-lived accommodations.[42]

A strong counter-agitation on the education question ensued, soon blending with an intensely revived campaign of propaganda, which, while centered on that question, manifested a far broader anti-Catholic hostility, denunciatory of the danger of "Papists in all the high places of the nation, with the control of cities and states, our Sabbath abolished, our educational system in ruins, Romanism established, and sustained by law * * * our religious freedom gone." [43]

This campaign built up to a peak in the decade immediately preceding the Constitutional Convention of 1894. The work of the convention, in its drafting and adopting of Article XI-3,[44] cannot be realistically appraised except in relation to that movement which, indeed, found its culminating expression in that provision.[45]

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[42] See generally, Pratt, *supra*, 158-203.

[43] From Mtehodist Quarterly Review, L. (1868) 531, as quoted in Pratt, *supra*, 202.

[44] The original numbering of the provision was Article 9, section 4, the present numbering having been adopted in 1938. The present numbering is employed, for purposes of clarity, throughout this article.

[45] The two chief organizations in New York which conducted the propaganda were the Central Committee for Protecting and Perpetuating the Separation of Church and State, to which generous and prestigious sponsorship was given by John Jacob Astor, John D. Rockefeller and Cornelius Vanderbilt, and the American

A logical resultant of the pressures thus built up was a twofold focus of the discussions in the convention: (a) that there should now be established a constitutional bar, prohibiting public grants to sectarian educational institutions; (b) that the vice of all such grants lay simply in the nature of the institution as sectarian.

As to the first point of focus, its extremely *negative* character is to be noted. The dominant sentiment which swept to triumph in the convention was not upon *whether* the serious economic and moral problem in education faced by millions of Catholic citizens might be solved through some accommodation, respecting their schools, which would also protect the public interest. Rather, the sentiment was that of slamming the door in the face of imminent and mortal threat. This, in turn, accounts for

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Protective Association. The latter was a nationwide organization. The foremost authority on the "A. P. A.," Professor Donald L. Kinzer, states that its national influence peaked in the years 1893-1895. D. Kinzer, an Episode in Anti-Catholicism: The American Protective Association, 95-212 (1964). In 1894 the A.P.A. wielded a powerful influence in the State of New York. *Id.* at 145-147. Pratt relates that in the Convention, "the spearhead of the anti-Catholic thrust was the National League for the Protection of American Institutions, whose New York backers included J. P. Morgan, Cornelius Vanderbilt, Cyrus W. Field and John D. Rockefeller." Pratt, *supra*, 229-231 (1967). As each of these organizations was the direct descendant of the Nativist movement and the Know-Nothing Party, so each—with its casting of suspicion upon the citizenship and trustworthiness of Catholics and their Church leaders, its effort to promote hysteria over the threat which Catholic schools were said to pose to public education, and its violent appeal to latent, and sincere family-nurtured hostility to Catholicism—sowed the seeds which would find expression, in the new century, in the sordid excitements to be engendered through the Ku Klux Klan, POAU, the Smith campaign of 1928 and the Kennedy campaign of 1960. See W. Randall, The Ku Klux Klan: A Century of Infamy (1965); G. Myers, History of Bigotry in the United States, 140-295 (1943); L. Creedon and W. Falcon, United for Separation (1959); II A. Stokes, Church and State in the United States, 331-333, 406-410 (1950); M. and H. Josephson, Al Smith: Hero of the Cities, 350-400 (1969); P. Barrett, Religious Liberty and the American Presidency (1963).

the second point of focus: consideration of the public functions of sectarian educational institutions were dismissed as beyond the pale.

Nothing is found in the convention records to indicate that any serious discussion was had of the social value or public benefits conferred upon New York society by her sectarian schools. One thing alone mattered: that they were sectarian educational institutions. Or rather what mattered was that these sectarian educational institutions were mainly *Roman Catholic*. That, unhappily, is the unanswerable testimony of the historical record.

While there was but a handful of sectarian schools in New York that were not Catholic, Protestant and Jewish welfare institutions were numerous—especially the former. And herein is found further testimony to the specifically anti-Catholic thrust of the convention in relation to the education question, as contrasted with the "charities" question. While the convention adopted Article XI, section 3, as its answer to the education question, it adopted Article VIII, section 1,[46] as its answer to the charities question.

Professor Pratt reports the argument of the Republican delegate, George Bliss, in favor of nonapplication of Article XI-3's church-state separation principle to charities:

> "Bliss went on to say that 'no money is taken [by virtue of Article VIII-1] from the State Treasury or City Treasury in aid of any denominational or ecclesiastical body * * * [or] for the

[46] "* * * nothing in this constitution contained shall prevent a county, city, or town from making such provision for the aid, care and support of the needy as may be authorized by law, nor prevent any such county, city or town from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions and of children placed in family homes by authorized agencies, whether under public or private control, or from providing health and welfare services for all children. * * *"

dissemination of tenets of any religious body.' Public aid to sectarian charities went for services actually performed, and for nothing else. 'The money appropriated is certainly, so far as Catholic institutions are concerned, appropriated for the support of those who are in them and whom the State would have to support, if not in those institutions, then elsewhere.' The system of public aid, originally begun to assist Protestant orphan asylums in 1849, was now widely accepted as humane and necessary and should not be overturned for transient reasons. 'In an economical point of view it helps the State by throwing upon private benevolence a portion of the expense which otherwise would fall wholly upon the State.' Bliss returned to this economy argument again and again. He also stressed the humanitarian theme: the present system of charitable grants 'gives to the wards of the State the advantage of the private care—of the personal interest—which cannot be got in an institution managed by officers of the State.'' [47]

The Bliss statement (which came to represent the consensus) is notworthy. It first says that public expenditure for church-related welfare organizations is not "in aid of any denominational or ecclesiastical body." That is to say nothing other than that public moneys may flow to a religious institution without having any necessary effect of aiding its sponsoring church qua church.

This is an especially important observation in view of the fact that the church-related welfare institutions, of which the new "charities" Article VIII-1 took cognizance, carried on [48] extensive educational functions, and in view of the further fact that the Protestant charitable institutions (particularly those devoted to child care and delinquent females) were famous for the zeal with which

[47] Pratt, *supra*, 249-250 (1967).

[48] And still do.

they sought to inculcate Protestant religious and moral teachings. Bliss's statement that no public money would, under Article VIII-1, be "for the dissemination of tenets of any religious body" flew in the face of the obvious fact that *all* religiously affiliated welfare agencies carry out religious as well as secular educational functions.

Indeed, the new Article VIII-1 expressly recognized this fact with its careful specification of "*secular* education of inmates of orphan asylums, homes for dependent children" * * * (etc.). In the Bliss statement we see an insouciant word-play, attempting to create a constitutional distinction between "welfare" and "education"—a confusion which has been perpetuated to the present by a few commentators opposed to meaningful aid to educational endeavors of parochial schools.[49]

As described by Bliss, the "secular educational function" of a church-related social institution is publicly supportable. As paraphrased by Professor Pratt: "Public aid to sectarian charities went for *services actually performed,* and for nothing else." (Emphasis supplied.) The secular educational function was thus deemed separable, for purposes of public support, from the religious function.

Two further concepts of towering importance appear in the Bliss statement: (1) the *public* interest served through savings effected to the State by the sectarian social agency; (2) the public interest in preserving meaningful individual freedom of choice in a pluralism of private institutional options ("* * * gives to the wards of the State the advantage of the private care—of the personal interest —which cannot be got in an institution managed by officers of the State").

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[49] See, e.g., Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680 (1969), and note comment upon Professor Freund's views in Valente, Aid to Church-Related Education—New Directors Without Dogma, 55 Va. L. Rev. 579, 601 (1969). See also Valente and Stanmeyer, Public Aid to Parochial Schools—A Reply to Professor Freund, 59 GTWN, L. J. 59 (1970).

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1970

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Nos. 569, 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island,

Appellants,

and

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. MCELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMMISKEY, and CORNELIUS A. CUMMISKEY,

Intervenor-Appellants,

v.

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,

Appellees.

On Appeal from a Three-Judge United States District Court for the District of Rhode Island

MEMORANDUM FOR APPELLEES

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Appellants,

and

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. MCELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMMISKEY, and CORNELIUS A. CUMMISKEY,

Intervenor-Appellants,

v.

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,

Appellees.

On Appeal from a Three-Judge United States District Court for the District of Rhode Island

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MEMORANDUM FOR APPELLEES

This memorandum is submitted in response to the separate Jurisdictional Statements filed by the Defendants-

Appellants Rhode Island Commissioner of Education and other officials and the Intervenor-Appellants.

In this case, a three-judge District Court unanimously held unconstitutional the Salary Supplements Act of the State of Rhode Island on the ground that it violates the First Amendment to the Constitution of the United States.

Although we believe that the decision of the court below was correct, we suggest that probable jurisdiction be noted. This Court has already noted probable jurisdiction in the case of *Lemon, et al.* v. *Kurtzman, et al.*, No. 89, October Term, 1970, and *Tilton, et al.* v. *Richardson, et al.*, No. 153, October Term, 1970. In the former case, a three-judge District Court in Pennsylvania dismissed a complaint challenging a statute basically similar to the one herein involved. In the latter case, a three-judge District Court in Connecticut after trial dismissed a complaint challenging the constitutionality of the use of Federal funds to finance construction at sectarian institutions of higher education. While both of these cases require consideration of the meaning and applicability of the Establishment and Free Exercise Clauses of the First Amendment to governmental support of sectarian educational institutions, the *Tilton* case deals with higher education and the *Lemon* case was decided on the pleadings without the benefit of a trial record.

In *W. E. DuBois Clubs* v. *Clark*, 389 U.S. 309, 312 (1968), the Court expressed reluctance to decide "important and difficult constitutional issues . . . devoid of factual context." In *Board of Education* v. *Allen*, 392 U.S. 236 (1968), the Court likewise expressed dissatisfaction with determining

serious constitutional issues in the absence of a factual record.

The present case was decided on the basis of an adequate trial and factual determinations by the trial court. It therefore presents a more appropriate case for determination of the issues than the *Lemon* case.

There is of course no question that the issues raised in this case are substantial and of national importance.

Accordingly, the Appellees suggest that probable jurisdiction be noted in this case and that the case be set down for oral argument together with the *Lemon* and *Tilton* cases.

Respectfully submitted,

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